IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

Bheru Singh Vs. Narpat Singh

S.B.CIVIL REGULAR SECOND APPEAL NO.68/1990
Against the judgment and decree dated 16.7.1990 passed by the Addl.District Judge, Bali in Civil Appeal (Decree) No.4/87 against the judgment and decree dated 8.9.1987 passed by the Civil Judge, Bali in Civil Original Suit No.34/83.

Date of Judgment : 14th March, 2005

PRESENT

HON'BLE MR.JUSTICE DINESH MAHESHWARI

Mr.B.R.Mehta for the appellant
Mr.Rajesh Choudhary for Mr.Suresh Shrimali for the respondent

BY THE COURT:

Suit for specific performance of contract being Civil Original Suit No.34/1983 filed on 4.5.1983 by the plaintiff – Narpat Singh was decreed after trial by the Civil Judge, Bali (District Pali) by the judgment and decree dated 8.9.1987. The appeal preferred by the defendant-appellant Bheru Singh being Civil Appeal (Decree) No.4/1987 was dismissed by the Addl.District Judge, Bali on 16.7.1990. Hence, the unsuccessful defendant in two courts below

has preferred this second appeal under Section 100 of the Code of Civil Procedure (CPC).

The present second appeal was admitted by this Court on 12.10.1990 formulating the following substantial question of law,-

> "Whether the lower courts have seriously erred in holding that the suit was within limitation?

Although the question of law so formulated by this Court requires consideration of the question of limitation only, however, the learned counsel for the appellant urged at the time of hearing in the alternative that in the facts and circumstances of this case, the question as to whether the plaintiff has been able to establish his readiness and willingness to perform his part of the contract and further question as to whether the equitable relief of specific performance could be granted to the plaintiff who has belatedly approached the court by way of the suit also require consideration. In order to consider the submissions at bar, it shall be useful to refer to the facts available on, and the circumstances emerging from the record.

Although the plaintiff has sued as Narpat Singh son of Hamir Singh Rajput and defendant has been shown as Bheru Singh son of Devi Singh Rajput but the fact remains that both the plaintiff and the defendant are natural born sons of the same father Devi Singh.

Briefly put, the plaintiff averred in the plaint that a house (referred as `Rawala') was situated at Mokampura, Tehsil Bali, in which, he was having ownership rights over half of the portion and the remaining half was of the ownership of Smt.Mohan Kanwar widow of Hamir Singh. The said Smt.Mohan Kanwar gifted her property to the defendant and in this manner, the defendant acquired ownership rights over the half portion of the Rawala. In the year 1973, various disputes arose between the plaintiff and the defendant relating to various immovable properties and ultimately with the intervention of the respectable persons of the community, on 14.11.1973, all the disputes were settled regarding which a document was executed between the mother of the plaintiff Smt.Ugam Kanwar and the defendant.

The plaintiff further averred that on the same day (i.e. 14.11.1973), a separate agreement was executed between the plaintiff and the defendant, according to which, the half portion of

the ownership of the defendant in the said Rawala was agreed to be sold by the defendant to the plaintiff for Rs.4000/-. The defendant received Rs.100/- towards sale consideration on the same day and for payment of the remaining amount of Rs.3900/- and for registration (of the document), 12 months' period was fixed. The plaintiff averred that in accordance with the agreement, he requested the defendant several times to complete the registration as he was ready to make payment of the sale consideration but the defendant kept on avoiding. When all the efforts on his part failed, then before adopting legal proceedings, he made efforts for resolution of the dispute with the intervention of the respectable persons sympathetic to both the parties. Thereupon, on 3.12.1975, in the presence of respectable persons, a settlement was arrived at, according to which, new terms of the transfer of the half share of the house (Rawala) on the basis of the agreement dated 14.11.1973 were settled and the sale consideration was enhanced from Rs.4000/- to Rs.7000/-. Apart from the amount of Rs.100/- paid on 14.11.1973, the plaintiff further made cash payment of Rs.2900/- on 3.12.1975 and it was decided that upon payment of the remaining amount of Rs.4000/- by the plaintiff to the defendant, the sale deed of the said half portion would be executed and got registered. In accordance with the said revised terms, the defendant on 3.12.1975 executed and handed over

a fresh agreement in favour of the plaintiff.

After the aforesaid averments relating to the facts about coming into existence of the agreements, the plaintiff averred that the defendant did not make any attempt to perform the agreement dated 3.12.1975 and that from the first week of February, 1983, the plaintiff was regularly trying that the defendant would accept the remaining sale consideration of Rs.4000/- and get the sale deed registered but the defendant was not paying any heed. According to the plaintiff, several attempts were made through respectable persons but the defendant never got ready to perform the agreement dated 3.12.1975, whereas, the plaintiff always remained ready and willing to perform his part of the conditions. The plaintiff then served a notice through his lawyer which was received by the defendant on 18.2.1983 but the defendant neither informed for completion of the proceedings for registration nor replied the notice. The plaintiff further averred that he has always remained ready and willing to make payment of the remaining amount of sale consideration in accordance with the agreements dated 14.11.1973 and 3.12.1975; he was and is ready and willing to purchase the half portion of Rawala of the ownership of the defendant but the defendant was intentionally not performing the agreement and hence

the suit was required to be filed. For the purpose of limitation, the plaintiff pleaded that the suit was within limitation in accordance with Article 54 of the Limitation Act, because the defendant has not agreed to perform the agreement despite receiving of the notice on 18.2.1983. The plaintiff prayed for a decree for specific performance of the agreement and for payment of the amount of Rs.4000/- or as determined by the court as due to be paid by him to the defendant and for delivery of the documents of title and for possession.

The defendant in his written statement did not dispute particulars of the property nor disputed the averments regarding respective ownership rights of the parties. However, regarding the averments in the plaint which related to coming into existence of the agreements, the defendant came out with a flat denial of existence of any such agreements. The defendant, on the contrary, averred that no dispute existed between the plaintiff and the defendant in the year 1973 but the dispute was between the mother of the plaintiff Smt.Ugam Kanwar and the defendant and on 14.12.1973 the settlement was arrived at between Ugam Kanwar and himself which related to the agriculture land. On that day, no agreement was executed between the plaintiff and the defendant.

According to the defendant, he signed the stamp paper on being informed that it was containing the recitals about the settlement. The defendant was not literate and only put signatures. He never executed any agreement in respect of the house with the plaintiff. All the averments regarding the agreement, of sale consideration, and of time limit of 12 months were denied. The averments in the plaint relating to the avoidance of performance were also denied with the submissions that he entered into a settlement with Ugam Kanwar only and when he never entered into any agreement with the plaintiff for sale, the question of any avoidance did not arise. The averments relating to second agreement dated 3.12.1975 were also specifically denied by the defendant and he denied settling of any new terms. The defendant alleged that in the year 1975, the plaintiff and the defendant were at hot terms and not talking to each other. There was no sale consideration of Rs.4000/- nor it was increased to Rs.7000/- as the parties were not on talking terms. The defendant denied payment of Rs.2900/- by the plaintiff and submitted that he was not in need of money and has continued to remain in possession of half porton of Rawala from the time it was gifted to him and partition at the site has of course not been carried out between the mother of the plaintiff and the defendant but the parties were occupying the portions as per their possession.

The averments regarding performance were also similarly denied with the submissions that when no agreement was entered into, the question of performance did not arise. According to the defendant, the notice was of course received but the same was absolutely wrong and baseless and the same was got replied through lawyer. With these averments, the right of specific performance as claimed by the plaintiff was denied. Regarding the question of limitation, it was averred that Article 54 of the Limitation Act was not applicable nor according to Article 54, the suit was within limitation. It was also averred that the half portion of the Rawala was of the valuation of Rs.1,50,000/- and even ten years' before, it was of the value of Rs.50,000/-. A property of Rs.50,000/- would not be sold by the defendant for a meagre amount. The suit valuation and the jurisdiction of the court were also challenged.

In the additional submissions, the defendant repeated the averments that he never asked for any stamp for sale agreement nor asked the petition writer to scribe any agreement. He signed the stamp on the belief that it related to the settlement regarding the land. The defendant further averred that contract was unfair on the very face of it nor was true and valid but was unjust and

unconscionable. According to the defendant, he had no other place of residence and was having his family and cattles and selling of Rawala was entirely impossible.

However, the status of the parties has been partly described by the defendant in the manner that Thakur Hamir Singh expired on Shravan Sudi 1, Svt.2022 leaving behind two wives, Mohan Kanwar being elder one and Ugam Kanwar, younger and both were having no issues. Both wives were living separate according to their possession and were having half share each in the property. The defendant-Bheru Singh was taken in adoption by Mohan Kanwar on 17.9.1967 but upon the dispute arising, Case No.87/1967 was tried in the Court of ADJ, Sirohi, then Mohan Kanwar gifted undivided half property of her husband to the defendant on 19.12.1970. The defendant submitted that right from the beginning, the conduct of the parties was such that existence of anything like disputed contract which is unfair and unjustifiable cannot be believed and such contracts were not enforceable.

On the pleadings of the parties, the learned trial court framed eight issues. Issue No.1 related to the question about the existence of the agreement dated 14.12.1973 and payment of sale

consideration of Rs.100/- by the plaintiff. Issue No.2 related to the question of existence of the agreement dated 3.12.1975 for Rs.7000/- and further payment of Rs.2900/- by the plaintiff. Issue No.3 was framed on the question as to whether the plaintiff was and is ready and willing to purchase the house in accordance with the agreements dated 14.11.1973 and 3.12.1975? Issue No.4 related to the question of limitation, issue no.5 to the question of suit valuation and jurisdiction and issue no.6 about the claim of compensatory costs by the defendant. Issue No.7 was framed on the question if the suit was not maintainable for the reasons stated in para 2 and 3 of the additional pleas by the defendant and issue No.8 relating to the relief.

In oral evidence, the plaintiff examined PW-1Dhanraj, petition writer and scribe of the first agreement dated 14.11.1973; PW-2 Javerchand one of the witnesses to the second agreement dated 3.12.1975; PW-3 Ranjeet Singh scribe of second agreement dated 3.12.1975; PW-4 Hamir Singh one of the witnesses to the first agreement dated 14.11.1973; and PW-5 Narpat Singh, the plaintiff himself. On the other hand, the defendant – Bheru Singh examined himself as DW-1 and produced DW-2 Bhima Ram and DW-3 Mana Ram and closed the evidence. In the documentary evidence, the

plaintiff produced on record the first agreement dated 14.11.1973 as Ex.1; the second agreement dated 3.12.1975 as Ex.2; the notice dated 16.2.1983 as Ex.3 and the acknowledgment thereof as Ex.4. The defendant on the other hand produced undated reply to the notice sent to the lawyer of the plaintiff as Ex.A/1 and his acknowledgment as Ex.A/2.

The learned trial Judge after hearing the parties finally proceeded to decide the issues involved in the case by his judgment dated 8.9.1987. After consideration of the relevant evidence, the learned trial Judge found that although the defendant has denied the execution of the agreement dated 14.11.1973 Ex.1 but has placed nothing on record by which execution of the agreement Ex.1 could be disbelieved. Issue No.1 was decided in favour of the plaintiff. Similarly with reference to the evidence on record, the learned Judge found that the plaintiff has proved the agreement Ex.2 and the defendant although coming out with a denial has not produced any evidence for which execution of the agreement Ex.2 could be disbelieved. Issue No.2 was also decided in favour of the plaintiff. On issue No.3 regarding readiness and willingness of the plaintiff to perform his part of the agreement, the learned Judge found that the plaintiff has categorically asserted that he was always ready and

willing to purchase the half portion of the house from Bheru Singh and was still ready to purchase and was ready to make payment of the amount. The learned Judge found that nothing contrary to the assertion of the plaintiff has been stated by the defendant, hence issue No.3 was also decided in favour of the plaintiff. It was contended on behalf of the defendant on Issue No.4 that suit was required to be filed within three years as provided under Article 54 and the suit for specific performance of the agreement dated 3.12.1975 having been filed on 4.5.1983 was barred by limitation. The learned trial Judge observed that under Article 54 when no date for performance has been fixed in the agreement, then the limitation would start only from the date the plaintiff would have the knowledge of the fact that the defendant has denied the specific performance. The learned Judge distinguished the cases cited before him and found that the payment of Rs.100/- and then Rs.2900/- in the present case was established and the defendant has failed to show any such fault on the part of plaintiff by which he has made inordinate delay or that he was not ready to complete the agreement. Issue No.4 was also decided in favour of the plaintiff. Issue No.5 relating to the question of valuation and jurisdiction was also decided against the defendant for want of any particulars and any evidence. Issue No.6 was not pressed by the defendant. On

issue No.7, the learned Judge observed with reference to Section 20 of the Specific Relief Act that mere inadequacy of consideration or mere fact that contract was onerous to the defendant would not be deemed to constitute unfair advantage or hardship. The learned Judge also observed that there was no recital about any alleged hardship at the time of execution of the agreement and now when the agreement has been proved, the reference to the hardship was entirely unjustified. In view of the decisions on the issues involved in the case, the plaintiff was found entitled for the decree of specific performance. The learned trial court accordingly decreed the suit directing that upon payment of Rs.4000/- within three months by the plaintiff, the defendant would get the registration carried out on the plaintiff making payment of the registration charges and to hand over the vacant possession of the disputed property after registration.

The judgment and decree aforesaid dated 8.9.1987 by the Civil Judge, Bali were assailed in Appeal No.4/1987 by the defendant – Bheru Singh before the Addl.District Judge, Bali who proceeded to decide the appeal after hearing the parties on 16.7.1990. The contentions which were made before the learned Appellate Judge deserve to be noticed. On behalf of the defendant –

appellant in the said appeal, the factum of execution of the agreement Ex.1 was not disputed. The first contention was raised to the effect that execution of the second agreement Ex.2 was not proved and the same was not on stamp paper, therefore, the decree of specific performance could not be granted. The learned Judge referred to the relevant evidence and while rejecting this contention affirmed the finding that agreement Ex.2 was executed by the defendant in favour of the plaintiff after receiving Rs.2900/-.

The second contention raised on behalf of the appellant was to the effect that as the plaintiff has admitted that the second agreement Ex.2 was executed on the basis of the first agreement Ex.1 and as the agreement was to be performed within 12 months according to Ex.1, therefore, the time was an essential element and therefore this agreement cannot be performed after 12 months. A corollary of this second contention was also raised to the effect that the plaintiff was to perform the agreement within 12 months but he failed to do so and that also shows that he was not ready to perform his part of the agreement, hence for want of compliance of Sec.16 (c) of the Specific Relief Act, the suit be dismissed.

The aforesaid two inter-connected contentions were also considered by the learned Appellate Judge and with reference to the terms of two agreements Ex.1 and Ex.2, the learned Judge observed that time was not of the essence of the contract specifically for three reasons, first that agreement related to immovable property; secondly, contract was to be completed within 12 months under Ex.1 but recital in Ex.2 was to the effect that whenever Rs.4000/- would be paid, registration would be carried out, therefore, no time limit was fixed; and thirdly, the appellant never served any notice for limiting the time for performance. Referring to the decision of Hon'ble Supreme Court in AIR 1967 SC 868 (Gomathinayagam Pillai and ors. Vs. Palaniswami Nadar) cited on behalf of the defendant – appellant, the learned Judge found that principle enunciated was to the effect that if the time was essential and is not borne out from the agreement, then time would not be treated to be of essence. Ancillary contention was also dealt with by finding that the time limit of 12 months was not fixed in the agreement Ex.2 but the agreement was for executing the sale deed on payment of the amount, therefore, not asking for registration within 12 months was of no effect. While referring to the pleadings and evidence, the learned Judge found proved that the respondent-plaintiff was always ready and willing to perform his part of the contract and was still

ready to do so. No other point was pressed before the learned Judge. Therefore, the learned appellate Judge ordered dismissal of the appeal with costs and affirmed the decree passed by the trial court.

Against the judgment and decree dated 16.7.1990 passed by the learned Addl. District Judge, Bali, the defendant-appellant has preferred this second appeal which has been admitted while formulating substantial question of law as noticed hereinbefore.

Making submissions on behalf of the appellant, the learned counsel strenuously contended that the present suit ought to have been dismissed as barred by limitation for the reason that the overall conduct and relationship of the parties show that even if the second agreement on 3.12.1975 was executed, the same was in continuation of the first agreement dated 14.11.1973 and as the period of 12 months was fixed in the first agreement dated 14.11.1973, the same became an essential ingredient of the second agreement also and for the purposes of limitation, three years' period under Article 54 of the Limitation Act ought to be counted beginning after 12 months of the agreement Ex.2, i.e. from 3.12.1976 and therefore the suit for specific performance filed on 4.5.1983 was barred by limitation.

The learned counsel further urged another question for consideration of this Court on the anvil of the submissions that for being entitled to a decree for specific performance of contract, the plaintiff was required to show that he was always ready and willing to perform his part of the contract right from the day of the agreement on 3.12.1975 upto the time of filing the suit and uptil the date of decree. The learned counsel contended that there is nothing on record to establish readiness and willingness from 3.12.1975 for a long period of about more than seven years when the appellant served a notice in the month of February, 1983. The learned counsel submitted that the relief of specific performance being an equitable relief ought to have been refused in this case as the plaintiff approached the Court after an inordinate delay. The learned counsel cited and relied upon N.P.Thirugnanam (D) by LRs. Vs. Dr.R.Jagan Mohan: AIR 1996 SC 116 and K.S.Vidyanadam and others Vs. Vairavan:AIR 1997 SC 1751 in support of his contentions.

Per contra, the learned counsel for the respondent submitted that the only substantial question of law formulated in this case relates to the question of limitation. Learned counsel submitted that only second part of Column-III of article 54 of the Limitation Act is applicable to the present case because no time limit for performance

was fixed in the agreement Ex.2. The learned counsel submitted that in the facts and circumstances of the case, the plaintiff would be deemed to have notice of refusal of performance only from 18.2.1983 when the defendant received notice and yet did not come forward to perform the contract and the suit was filed within three months thereafter and the same was clearly within limitation. The learned counsel further urged that a comprehensive look at the conduct of the parties and the two agreements makes it clear that the time limit of 12 months cannot be read in the second agreement and time was not of the essence of the contract. The learned counsel supported the considerations adopted by the learned courts below and further submitted that other substantial questions of law do not arise in this case and the contentions by the appellant on readiness and willingness deserve to be rejected. The learned counsel placed reliance on the decisions in K.Sambasiva Rao Vs. P.Bangaru Raju : AIR 1985 Andhra Pradesh 393, Mithu Khan Vs. Ms. Pipariyawali and others: AIR 1986 Madhya Pradesh 39, and Sri Babu Ram @ Durga Prasad Vs. Sri Indra Pal Singh (dead) by LRs : 1998 DNJ (SC) 332.

Having given a thoughtful consideration to the rival contentions and having scanned through the entire record, this Court

is clearly of the opinion that the present appeal is totally devoid of substance and deserves to be dismissed with costs.

The provisions and principles of law applicable to the case may be noticed. Article 54 of the Limitation Act provides for the limitation in filing of a suit for specific performance as under:-

Description of suit	Period of Limitation	Time from which period begins to run
54. For specific performance of a contract	Three years	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused

A suit for specific performance of contract is essentially governed by the provisions contained in Chapter II of Part II of the Specific Relief Act, 1963 (`the Act'). For the present purposes, suffice to notice that by virtue of Section 10 of the Act, the specific performance of any contract in the discretion of court may be enforced where there exists no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done or where the act is such that compensation in money for its non-performance would not be an adequate relief. Explanation to

Section 10 makes it clear that unless and until contrary is proved, the court would presume that the breach of contract to transfer immovable property cannot be adequately relieved by monetary compensation. While Section 14 provides for such contracts which cannot be specifically enforced with relevant exception and explanations, Section 15 enumerates the persons by and against whom, specific performance can be obtained. Section 16 deals with the personal bars to relief, i.e. a bar for a person concerned who may not obtain specific performance because of the applicability of any of the conditions of clauses (a) or (b) or (c) provided in the Section. Clause (a) disentitles a person to obtain specific performance if he would not be entitled to otherwise recover compensation for breach. Clause (b) puts a bar on a person who has become incapable of performing, or violates any essential term of the contract which was to be performed on his part, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract. This clause operates against a plaintiff seeking specific performance if his conduct is hostile to the contract. Clause (c) with which we are concerned in the present case puts another personal bar on a plaintiff to obtain specific performance if he fails to aver and prove that either he has performed or has always been ready and willing to perform the

essential terms of the contract which are to be performed by him and the performance whereof was neither prevented nor waived by the defendant. Explanation (ii) makes it clear that the plaintiff must aver either performance or readiness and willingness to perform the contract according to its true construction. However, explanation (i) clarifies that where the contract involves payment of money, the actual tender thereof is not essential. The provisions of Section 20 with which also we are concerned, provides for the discretion and powers of the court in granting specific performance. The jurisdiction to decree specific performance has been declared to be discretionary with the court being not bound to grant such relief, merely because it is lawful to do so. However, this discretion is not arbitrary but sound and reasonable, guided by the judicial principles, and therefore provided to be open for correction by a court of appeal. Sub-section (2) of Section 20 provides for the cases in which the discretion in refusing specific performance may be properly exercised. They include the cases where the terms of the contract or the conduct of the parties while entering into the contract or for entering into the contract are such that contract, though not voidable, gives an unfair advantage to the plaintiff or the defendant. Other such class of cases is where performance of contract would involve some unforeseen hardship on the defendant, whereas, the non-

performance would not involve such hardship on the plaintiff. Yet another such class is of the cases generally of the nature where the defendant enters into the contract under the circumstances which though not render the contract voidable but inequitable to enforce. The Explanation 1 and 2 to sub-section (2) of Section 20 make it clear that mere inadequacy of consideration, or merely the contract being onerous to the defendant, or improvident in its nature are not deemed to be constituting unfair advantage or hardship. The hardship is to be determined with reference to the circumstances existing at the time of the contract.

A reference to the relevant decisions shall be apposite at this juncture. In the case of N.P. Thirugnanam (supra) on which strong reliance has been placed by the learned counsel for the appellant, it was found by the courts that plaintiff N.P.Thirugnanam entered into the agreement of sale with Dr.R.Jagan Mohan Rao for alienation of a house property for a consideration of Rs.2,30,000/- and paid Rs.10,000/- as advance. Till execution of the sale deed, the plaintiff came into possession as a tenant at a rent of Rs.1650/- per month. He filed the suit for specific performance alleging the respondent evading to execute the sale deed. The respondents-defendants pleaded that they were ready and willing to perform their part of the

contract but the plaintiff did not pay Rs.20,000/- further advance as agreed by the month of December, 1979 and the amount was adjusted towards rent payable with consent. On appreciation of evidence, the Single Judge of the High Court found the plaintiff to be not ready and willing to perform his part of the contract and the appeal was also dismissed by the Division Bench. It was contended before the Hon'ble Supreme Court that plaintiff was always ready and willing to perform his part of the contract and in support of this contention, reliance was placed on the evidence of PW-2 who testified that he was prepared to lend a sum of Rs.2 lacs to the plaintiff. The Hon'ble Supreme Court rejected such contention with reference to the fact that before the trial Judge, on an application made by the defendants, a direction was given to the plaintiff to deposit the amount of Rs.2 lacs or furnish bank guarantee but he did neither. It was also found that plaintiff was dabbling in real estate business and various other deals and agreements and defaults made by him were noticed. In those circumstances, the Hon'ble Supreme Court pointed out that the remedy for specific performance is equitable and in the discretion of the court and merely for a valid agreement for sale, the court was not bound to grant the relief. With reference to Section 16(c) of the Act, the Hon'ble Supreme Court observed that continuous readiness and willingness on the part of the

plaintiff is a condition precedent to grant relief for specific performance. If the plaintiff fails to either aver or prove the same, he must fail. However, the Hon'ble Supreme Court laid down the principles for considering this aspect of readiness and willingness in the following terms:-

> **"**To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract **is to be adjudged with reference to the conduct of the party and the attending circumstances.** The court may **infer** from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."
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> (emphasis supplied)

In the fact situation of the said case of N.P.Thirugnanam (supra), the Hon'ble Supreme Court approved the findings of the two courts below as well supported from the facts.

In the other case relied upon by the learned counsel for the appellant of K.S.Vidyanadam and others Vs. Vairavan :AIR 1997

SC 1751, the Hon'ble Supreme Court considered a case where respondent's suit for specific performance was decreed in appeal by Madras High Court. The agreement of sale between the parties for a house for Rs.60,000/- stipulated of the house to be sold for the said consideration within a period of six months from the date of the agreement, i.e. 15.12.1978 and an advance of Rs.5000/- was paid. Within six moths, the second party was to purchase the stamp paper and after adjusting the advance amount was required to pay balance amount either in person or in the presence of Registrar. The plaintiff issued notice on 11.7.1981, stating inter alia that though as per agreement six months' time was stated but time was not agreed as essence of the contract. The plaintiff stated that though as per agreement, defendants were to deliver the vacant possession but because the tenant has not vacated the building so far, hence plaintiff was prepared to purchase the building with the tenant. The Hon'ble Supreme Court after referring to the scheme of the Specific Relief Act and Section 55 of the Contract Act and Article 54 of the Limitation Act held that of course it was consistently held that time is not of the essence of the contract relating to immovable property and the period of limitation for filing the suit is of three years, but from these two circumstance, it does not follow that every suit for specific performance of agreement which does not provide

specifically about time being of the essence of the contract should be decreed when filed within limitation notwithstanding the time limit stipulated in the agreement. The Hon'ble Supreme Court observed that it would amount to saying that time limits prescribed by the parties in the agreement have no significance or value or meaning. The Hon'ble Court referred to the facts of the case and found that plaintiff was sitting quite for 2 ½ years without taking any steps to perform his part of contract, though agreement specified the period of six months, within which, the plaintiff was expected to purchase stamp paper and tender the balance amount. In that situation, the Hon'ble Supreme Court accepted the defendants' case that value of the house property in Madurai Town were rising fast and this must have induced the plaintiff to wake up after 2 ½ years and demand specific performance. The Hon'ble Supreme Court also found as to why it was inequitable in that case to grant specific performance with the following,-

> **"**13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in **clear violation of the term of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months.** Further, the delay is coupled with substantial rise in prices – according to the defendants, three times – between the date of

> agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff."
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> (emphasis supplied)

It may also be noticed that in the case of Swarnam Ramchandran (Smt) and anr. Vs. Aravacode Chakungal Jayapalan: (2004) 8 SCC 689, the Hon'ble Supreme Court has held that time is presumed not to be of the essence of the contract relating to the immovable property but is of essence in contract of reconveyance or renewal of lease. The Hon'ble Supreme Court held,-

> "10. The key issue which is to be decided in this civil appeal is : whether time was the essence for payment of Rs.75,000 on or before 30.9.1981 and whether the said term was breached. This question does not depend only upon express stipulation made by the parties, **but it also depends upon the intention of the parties.** Notwithstanding that a specific date was mentioned in the agreement, one has not only to look at the letter but also at the substance of the contract. Whether time is of essence is a question of fact and **the real test is the intention of the parties.** It depends upon the facts and circumstances of each case.
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> 11. According to Pollock & Mulla : Indian Contract & Specific Relief Acts [(2001), 12th End., p. 1086], the intention can be ascertained from :
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> "(i) the express words used in the contract;
> (ii) the nature of the property which forms the subject- matter of the contract;
> (iii) the nature of the contract itself; and
> (iv) the surrounding circumstances."

> 12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. **The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence.** That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract."
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> (emphasis supplied)

A reference to the decision of Hon'ble Supreme Court in the case of Gomathinayagam Pillai and others Vs. Palaniswami Nadar: AIR 1967 SC 868 may also be made wherein the Hon'ble Supreme Court amongst other principles held,-

> "Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract."

A reference to another decision of Hon'ble Supreme Court in the case of Mademsetty Satyanarayana Vs. G.Yelloji Rao and others: AIR 1965 SC 1405 may also be made wherein the Hon'ble Court observed,-

> "The result of the aforesaid discussion of the case law may be briefly stated thus : While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India **mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief.** But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression "waiver" in its legally accepted sense, namely, "waiver is contractual, and may constitute a cause of action : it is an agreement to release or not to assert a right"; see Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, 62 Ind App 100 at p.108 : (AIR 1935 PC 79 at p.82). It is not possible or desirable to lay down the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is **directly responsible in inducing the defendant to change his position to his prejudice** or such as to bring about a situation when it would be inequitable to give him such a relief."
>
> (emphasis supplied)

In the case of Mithu Khan Vs. Pipariyawali : AIR 1986 Madhya Pradesh 39, the High Court while considering the operation of Article 54 of the Limitation Act held that the first part of Article 54 does not apply to loosely worded agreements, where the promiser

undertakes to execute a sale deed, not on the happening of a particular event. In the second part of Article 54, it is necessary to establish not only the refusal of performance but knowledge of such refusal by more than three years prior to the suit.

In the case of K.Sambasiva Rao Vs. P.Bangaru Raju :AIR 1985 Andhra Pradesh 393, the agreement did not stipulate the date for performance and only the plaintiff was to select one acre out of 13 acres of land within six months from the agreement dated 30.9.1965. No action was taken by the parties for ten years but then first refusal was held to have been indicated on 4.9.1978 and consequently the suit filed on 9.3.1981 was held to be within limitation. The contention regarding unconscionable delay was rejected with reference to the observations by the Hon'ble Supreme Court in Satyanarain's case (supra) that mere delay without more, extending upto the period of limitation cannot possibly be a reason for exercising the discretion against giving relief of specific performance. The contentions regarding want of pleadings for readiness and willingness were also rejected with reference to the pleadings and the statement of the plaintiff in the court of his being ready and willing to perform his obligations.

The Hon'ble Supreme Court in the case of Sri Babu Ram @ Durga Prasad Vs. Sri Indra Pal Singh (dead) by Lrs :1998 DNJ (SC) 332 regarding question of limitation held thus:-

> "39. Under Art.54 of the Limitation Act, 1963, it is stated in the third column that the suit for specific performance has to be filed within 3 years from the date stipulated in the contract or from the date of refusal to perform the contract. In the present case, even though a period of 5 years is fixed for exercising the option to repurchase, it is not specified in the agreement that the vendee shall execute the deed of repurchase within a particular period from the date of exercise of option. Hence, the first part of the third column of Art.54 does not apply. The second part applies. Time therefore starts to run only from the 22.7.1968, the date when the defendant refused to execute the deed of re conveyance. The suit was filed on 6.10.1969 within 3 years from 22.7.1968. Suit is in time as held by the trial Court. Point 5 is held in favour of the plaintiff."

On the question of law formulated by this Court, it is required to be considered whether the learned courts below were in error in treating the suit within limitation.

The facts available on and the circumstances emerging from the record show that in the present case, it is not in dispute that the agreement Ex.2 does not contain any time for performance. The manner in which the agreement Ex.2 has come into existence is

significant. It is borne out from the record that both the plaintiff and the defendant were born to the same father Devi Singh. Hamir Singh was the brother of Devi Singh. Hamir singh had two wives Mohan Kanwar and Ugam Kanwar and leaving both of them issueless, Hamir Singh died. As stated by the defendant-Bheru Singh, it was the defendant who allegedly went in adoption with one of the wives of Hamir Singh, namely Smt. Mohan Kanwar. On the other hand, the plaintiff Narpat Singh is alleged to have been taken in adoption by Smt.Ugam Kanwar, the other wife of Hamir Singh. This seems to have led to serious disputes and probably the adoption of the defendant was under clouds as admitted by the defendant himself. It appears that amidst the disputes, Smt. Mohan Kanwar purported to gift her half share in Rawala to the defendant-Bheru Singh. There had thus been serious disputes between the parties representing sharp conflicting interests. The plaintiff has alleged this "dispute" to be between himself and the defendant, whereas, the defendant has asserted that dispute was between Ugam Kanwar and the defendant. In either event, it makes no difference. The battle ultimately culminated into a settlement on 14.11.1973.

It is required to be reiterated that before the first appellate court, the learned counsel for the appellant Bheru Singh

specifically admitted the factum of execution of the agreement Ex.1. So far the execution of the second agreement Ex.2 dated 3.12.1975 is concerned, the same is purely a question of fact and has concurrently been found by the learned courts below in favour of the plaintiff and rightly so as the evidence on record has categorically established the dealings between the parties.

It is, therefore, clearly established on record that there were disputes between the parties. In resolution thereof, the first agreement dated 14.11.1973 was executed by which the defendant was to convey his half share in Rawala to the plaintiff-respondent for a consideration of Rs.4000/- and he received Rs.100/- towards this agreement. It is also clear that a time limit of 12 months was stipulated for performance in the first agreement Ex.1. The plaintiff has asserted that second agreement was executed on 3.12.1975 because the defendant did not honour the first agreement despite efforts of the plaintiff to get the sale deed executed. The defendant has not come out with anything on record to suggest any default on the part of the plaintiff in the performance of the first agreement. Be that as it may, quite conscious of the first agreement, nearly two years thereafter, the defendant executed second agreement on 3.12.1975, the recital whereof being directly relevant for the present

purposes could be usefully reproduced as under:-

"इकरार नामा लिख दिया मैं भैरूसिंह पुत्र देवीसिहजी राजपूत निवासी मौखमपुरा तहसील बाली बहक आप श्री नरपतसिंह जी पुत्र हमेर सिंह जी राजपूत निवासी मौखमपुरा तहसील बाली तथा दिनॉक 14-11-73 को आपके व हमारे बीच में विभिन्न अचल संपती के बारे मे समझौता होने पर यह भी तय हुआ था कि मौखमपुरा में जो रावला मकान वाके है उसका आधा हिस्सा मुझे श्री मति मोहन कुवरजी ने बकशीस दिया था व हिस्सा मैंने आपको रूपे 4000/- अक्षरे रूपे चार हजार में बेचने का इकरार किया था वह साई के रूपे 100 एक सौ मैंने आपसे ले लिये थे । इस इकरार नामे के अनुसार रजिस्ट्री 12 महने में करवाना तय हुआ था लेकिन कुछ कारणों से रजिस्ट्री अभी तक नहीं काराइ जा सकी तथा इसके बारे में अपने बीच में कुछ विवाद पैदा हो गये थे इन विवादों का भी अब निपटारा हो गया है अत: उक्त रावले का आधा हिस्सा रूपे सात हजार में बेचना तय किया है रूपे एक सौ 14-11-73 को मिल गये थे व रूपे उणतिसौ आज मिल गये है बकाया रूपे चार हजार जब भी आप मुझे दे देंगे मैं बेचान कर रजिस्ट्री करा दूंगा तथा कब्जा भी सौंप दूंगा इकरार नाम मैंने राजी खुशी से लिख दिया है सो सनद रहे"

From the recitals in the second agreement Ex.2, the nature of transaction and intention of parties becomes more apparent. The agreements were directly the results of the efforts for resolution of the disputes relating to the immovable properties. Although in the first agreement a time of 12 months was provided from 14.11.1973 but the admissions in the second agreement make it clear that the first agreement could not be honoured because of disputes spurting out in relation to the performance of the first agreement. In that situation, after about two years from the date of first agreement, the second agreement was executed in which the parties consciously omitted any time frame for performance of the agreement and the sale consideration of Rs.4000/- in the first agreement was enhanced to Rs.7000/-. Further more, the plaintiff made a payment of Rs.2900/- on the date of second agreement i.e. 3.12.1975 and thereupon it was decided that whenever the plaintiff would make the payment of the remaining amount of Rs.4000/-, the defendant would execute the sale deed and hand over the possession. It is apparent that the time was never the essential ingredient, never taken to be of the essence of the contract and even if 12 months were provided in the first agreement dated 14.11.1973, consciously any such period was omitted in the second agreement which itself was the outcome of settlement of the disputes. The contention by the learned

counsel for the appellant that period of 12 months as provided in the first agreement be read in the second agreement also or time being considered to be an essence of the contract because of 12 months' period in the first agreement cannot be accepted and squarely contrary to what has been suggested by the learned counsel for the appellant, it appears that the parties consciously omitted the time frame in the second agreement, hence removing any doubt, if the time was ever considered to be an essential ingredient. This apart, the defendant consciously received substantial part of sale consideration on 3.12.1975 and then agreed that he would execute the sale deed whenever the plaintiff would make the remaining payment.

As no time was fixed for performance, obviously the second part of column III of Article 54 would apply and limitation would begin to run only upon the plaintiff's knowledge that the defendant had refused the performance. This knowledge cannot be imputed upon the plaintiff before 18.2.1983 when the defendant was served with the notice and yet did not perform the contract. Positive refusal has come only by way of reply to the notice Ex.A/1 which has been received by the counsel for the plaintiff on 11.3.1983 vide Ex.A/2. The suit filed on 4.5.1983 is clearly within limitation and the learned

courts below have not erred in holding the suit to be within limitation.

The formulated question of law is specifically answered in negative. That is to say that lower courts have not erred in holding that the suit was within limitation.

Other submissions sought to be made by the learned counsel for the appellant are also devoid of substance and deserve to be rejected.

So far the decisions relied upon by the learned counsel for the appellant are concerned, as seen hereinbefore, in the case of N.P.Thirugnanam (supra), the plaintiff was shown to be dabbling in real estate and although entered into the property on the basis of agreement,did not pay advance which was adjusted towards rent payable and then the plaintiff failed to comply with the directions of the court to deposit or furnish bank guarantee for the amount of Rs.2 lacs. The plaintiff was clearly found wanting in his readiness and willingness. Even while rejecting the case of the plaintiff, the Hon'ble Supreme Court held that factum of readiness and willingness is to be adjudged with reference to the conduct of the party and

attending circumstances and an inference could be drawn. The decision in N.P.Thirugnanam does not apply to the facts situation of the present case. However, applying the principles enunciated by the Hon'ble Supreme Court, this Court is clearly of opinion that the attending circumstances of the present case lead to the only inference that the plaintiff was always ready and willing to perform his part of the contract. Similarly, the facts of the other decision relied upon by the appellant in K.S.Vidyanadam's case (supra), the parties have provided for six months period within which the transaction was to be completed and the Hon'ble Supreme Court found that in the face of such condition, total inaction on the part of plaintiff for 2 ½ years coupled with substantial rise and prices, brought about a situation where it would have been inequitable to give relief of specific performance. However, as noticed in the present case, the parties consciously avoided the time limit in the second agreement and moreover the defendant has failed to show any change or alteration in the equities before the plaintiff asked for and defendant refused the specific performance. The said case in K.S.Vidyanadam is also of no help to the contentions of the appellant.

Applying the principles of law enunciated by their Lordships of the Hon'ble Supreme Court, it is clear that ultimately the adjudication of the question of specific performance depends upon intention of the parties, and as found hereinabove, the intention of the parties was to settle the dispute relating to the property of Hamir Singh in which both basically levied claims by way of adoption. The intention is further discernible from the manner in which the second agreement has come into existence. This Court is clearly of opinion that the defendant had no legal defence to non-suit the plaintiff nor there is any reason for which specific performance be denied to the plaintiff.

In the present case, the defendant came out with the denial of the existence of the contract at all, but concluded and unquestioned findings of fact make it clear that such a defence was absolutely unfounded. The defendant having chosen to rest his case on the denial of the existence of the contract itself, not even suggested, not even as a remote alternative that any personal bar was operating against the plaintiff or it was inequitable to grant specific performance.

The plaintiff has categorically pleaded that he was always ready and willing to perform his part of the contract and has categorically stated so in his statements also. There is nothing on record to show that the plaintiff ever acted in any manner that his conduct may be considered hostile to the contract and the overall conduct of the parties lead to a reasonable inference that the agreement after agreement were executed to settle the disputes. The plaintiff has not been shown to have done anything which could be even remotely indicative of his intention of abandoning the contract. The plaintiff has stated in his examination-in-chief that after the agreement in the year 1975, he asked Bheru Singh for registration very many times. Of course, in the cross-examination, he has not been able to state the time when he offered the amount, but there is nothing on record to show that plaintiff ever acted in any manner indicative of discontinuation of his readiness and willingness. There is nothing further on record to show that any time earlier Bheru Singh refused to perform. Even if it be assumed that the plaintiff offered the amount for the first time in the year 1983, such conduct also cannot be said to be not in consonance with the spirit of the agreement because the parties consciously omitted to provide for any time frame for making the offer by the plaintiff. Viewed from any angle, the challenge to readiness and willingness of the plaintiff

to perform his part of the contract remains baseless and deserves to be rejected.

The defendant has not come out with any specific case to establish that it was inequitable to grant specific performance. The plaintiff cannot be held guilty of any inordinate delay in the facts situation of the present case. The suggestions by the defendant of the contract being onerous or operating as hardship to him are also baseless. The very nature of the dispute shows it clearly that both the plaintiff and defendant were litigating for the property left by Hamir Singh with each of them siding with one of the wives of Hamir Singh. It is no strange that the agreements were entered into for settlement of such disputes and the defendant agreed to part with the property gifted to her by Mohan Kanwar. The suggestion of any hardship by the defendant cannot be countenanced. Similarly, the consideration does not appear to be inadequate because the transaction was towards settlement of disputes and the consideration has also been raised from Rs.4000/- in the year 1973 to Rs.7000/- in the year 1975. The defendant has further failed to show that plaintiff was responsible in inducing him to change his position to his prejudice or to bring about such a situation where it would be inequitable to grant such a relief of specific performance.

There appears to be no reason at all for denying the relief of specific performance which has rightly been allowed by the two courts below. The contentions sought to be urged by the appellant do not give rise to any substantial question of law nor have any force. The contentions deserve to be and are rejected.

As a result of the answer in negative to the formulated substantial question of law and so also the rejection of the contentions of the appellant, this appeal fails and is dismissed with costs.

(DINESH MAHESHWARI),J.

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